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IN THE

Supreme Court of the United States

SEMPRA GENERATION, ET AL.,
AND
DYNEGY POWER MARKETING, INC., ET AL.,
Petitioners,
v.
PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL.,
Respondents.

MORGAN STANLEY CAPITAL GROUP, INC.,
AND
CALPINE ENERGY SERVICES, L.P., ET AL.,
Petitioners,
v.
PUBLIC UTILITY DISTRICT NO. 1
OF SNOHOMISH COUNTY, WASHINGTON, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CANADIAN ELECTRICITY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court should grant certiorari to review decisions of the Ninth Circuit authorizing the Federal Energy Regulatory Commission to abrogate valid, voluntarily negotiated wholesale energy contracts without proof that abrogation is in the public interest – decisions that will significantly harm the vital energy trade between the United States and Canada.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1891, the Canadian Electricity Association ("CEA") serves as the voice of the Canadian electricity industry. Its members include utility companies, major generators of electricity, and consulting firms. CEA contributes to the success of its members by providing a strong, united voice for their views on issues of regulatory policy. CEA also seeks more coordinated, effective, and efficient regulatory regimes in both Canada and the United States to provide commercial certainty and to promote investment, innovation, and economic growth.

CEA members sell electricity to wholesale purchasers in the United States, participating in "one of the world's largest and most comprehensive trading relationships, which supports millions of jobs in each country."[2] The Ninth Circuit's decisions in these cases cause CEA's members great concern because they impair the enforceability of power contracts entered into in the United States. CEA urges this Court to resolve the conflict between the decisions below and the Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*"), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*"). Reaffirming the authority of *Mobile* and *Sierra* will restore the contractual certainty that supports the massive Canada-United States energy trading relationship – a relationship that is vital to the United States' energy security.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief. A number of parties have filed letters granting blanket consent to the filing of *amicus* briefs, and letters reflecting the consent of the remaining parties to the filing of this brief have been filed with the Clerk.

[2] Canadian Embassy, *The Canada-U.S. trade and investment partnership*, *at* http://www.dfait-maeci.gc.ca/can-am/washington/trade_and_investment/trade_partnership-en.asp (viewed July 10, 2007).

STATEMENT

Canada maintains a critical energy partnership with the United States. What began with small interconnections and the development of boundary waters for hydroelectricity has evolved into extensive cooperative arrangements for managing transmission-system reliability. Today, the two sovereigns pump supplies of oil, natural gas, and electricity through a tightly integrated network of power lines and pipelines that crisscross the continent and supply vital energy to each nation's citizens.

Not all Canadian power sellers are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Some Canadian entities simply market electricity at the Canada-United States border and never participate in sales to which the Federal Power Act ("FPA") applies. *See* 16 U.S.C. § 824a(f). But other Canadian entities do participate in United States wholesale markets regulated by FERC under the FPA. Those entities supply a significant portion of the wholesale electricity consumed in neighboring regions of the United States, and their continued participation in the Canada-United States energy trade is critical to the United States' energy security.

Canadian power sellers that participate in the United States markets maintain a keen watch on developments in American law that affect their United States transactions. When new developments create regulatory uncertainty in the United States, those developments discourage Canadian power sellers from continuing to export electricity. Canadian power exporters have serious concerns about the Ninth Circuit's decisions in these cases.[3]

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[3] *Public Utilities Commission of California v. FERC*, 474 F.3d 587 (9th Cir. 2006) (Pet. App. 364a), simply applied the law as described in *Public Utility District No. 1 of Snohomish County v. FERC*, 471 F.3d 1053 (9th Cir. 2006) ("*Snohomish County*") (Pet. App. 1a), to a different set of facts, and so this brief refers principally to *Snohomish County*. References to "Pet. App." are to the appendix to the petition in No. 06-1462.

In *Snohomish County*, the Ninth Circuit addressed challenges to "wholesale energy contracts for future energy supplies – known as 'forward' contracts – entered into by power companies in California, Nevada, and Washington during" 2000 and 2001. Pet. App. 2a. Parties executed those contracts when, due to increased demand and insufficient supply, prices in California's short-term energy markets were unusually high. *Id.* at 23a-24a. Purchasers under those contracts subsequently claimed that the contract rates were unjust and unreasonable and asked FERC to modify them. *Id.* at 26a-31a.

FERC determined that the *Mobile-Sierra* doctrine applied to the contracts. That doctrine limits FERC's power to abrogate and modify the rates in wholesale power contracts. Under *Mobile-Sierra*, FERC cannot alter the terms of such contracts unless it finds that the "public interest" requires that one of the parties be let out of the deal. Here, FERC held that the contracts at issue were not contrary to the public interest. In particular, FERC observed that, although the contracts may have become "uneconomic over time" for the purchasers, "the challenged transactions were the result of [the buyers'] voluntary choices." *Id.* at 33a-34a (internal quotation marks omitted); *see Order on Initial Decision*, Pet. App. 246a; *see also Order on Rehearing*, Pet. App. 314a.

The purchasers sought review of FERC's orders in the Ninth Circuit. That court granted the petitions and remanded, concluding that FERC committed two significant errors. *First*, the Ninth Circuit held that FERC erred in applying the *Mobile-Sierra* doctrine to the forward contracts because FERC "lacked a mechanism to provide effective, timely relief from unjust and unreasonable rates due to market dysfunction." Pet. App. 3a. According to the Ninth Circuit, a forward contract should not be protected by *Mobile-Sierra*'s deferential "public interest" standard of review unless FERC has provided "an opportunity for *initial* review of whether [the] rate is just and reasonable," *id.* at 39a (emphasis added), and an opportu-

nity to reassess the contract's propriety after the fact, in light of subsequent market developments, *id.* at 57a-60a.

Second, the Ninth Circuit concluded that, in applying the public-interest standard, FERC used "a substantively erroneous mode of analysis." *Id.* at 4a. Giving short shrift to FERC's finding that abrogation of these contracts would destabilize the energy market to the long-term detriment of all consumers, the court held that FERC's public-interest inquiry "must give *predominant weight*" to the short-term impact "on the rates paid by the consuming public who use the energy covered by [each] contract." *Id.* at 61a (emphasis added).

As a result of the Ninth Circuit's ruling, FERC is now obligated to inspect the reasonableness of the terms of forward contracts voluntarily negotiated and entered into by sophisticated parties *before and after* the parties form their agreement. And, even then, FERC must modify contracts after the fact if necessary to mitigate a short-term "impact . . . on the rates paid by the consuming public." *Id.* This expansion of FERC's responsibilities endangers the important energy partnership between Canada and the United States.

SUMMARY OF ARGUMENT

This Court should review the Ninth Circuit's decisions in these cases because they threaten the flourishing Canada-United States energy trade, the health of which is vital to the United States' energy security.

Canada is the United States' most important energy partner, exporting millions of megawatt hours of electricity to this country every year. Generating excess electricity for export requires a substantial commitment of national resources. Canadians will be loathe to make those long-term commitments to United States entities operating in a regime in which FERC has authority to violate the sanctity of contracts to serve the perceived short-term interests of United States consumers. Such a regime conflicts with settled Canadian law and may discourage FERC's Canadian counterpart, the National Energy Board ("NEB"), from continuing to support current levels of electricity exports to the United States.

The decisions below also create tensions with the United States' obligations under the North American Free Trade Agreement ("NAFTA") and the Canada-United States Free Trade Agreement ("FTA"). Those treaties require the United States to ensure that FERC avoids disrupting energy contracts and that energy flows to Canada reliably. The decisions below, however, enhance FERC's authority to disrupt electricity contracts, which in turn threatens the reliability of steady energy flow between Canada and the United States.

ARGUMENT

I. CANADIAN ELECTRICITY AND NATURAL GAS PLAY AN IMPORTANT AND GROWING ROLE IN UNITED STATES ENERGY MARKETS

Canada today is the largest supplier of energy to the United States, "accounting for 94% of natural gas imports, nearly 100% of electricity imports, and more crude and refined oil products than any other foreign supplier." *Integrated Market*[4] at 7. Canada exports more than $41 billion worth of energy annually to the United States – nearly three times as much energy as the United States receives from Saudi Arabia.[5] And Canada has been a net exporter of electricity for more than a decade, sending far more electricity to the United States than it receives. *Id.* at 5.[6] In the 10-year period from 1997 to 2006, Canada exported nearly 400 million megawatt hours of electricity to the United States, worth nearly $25 billion Canadian.[7] In the same period, Canada, which is the world's third-largest producer of natural gas,[8] exported nearly 30,000

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[4] CEA, *The Integrated North American Electricity Market: Energy Security: A North American Concern* (Mar. 2007) ("*Integrated Market*"), *at* http://www.canelect.ca/en/Pdfs/3395_CEA_NA_paper_EN_Final.pdf.

[5] *See, e.g.*, Canadian Embassy, *Canada-United States: The World's Larges. Trading Relationship* 6 (Apr. 2004), *available at* http://www.canadianembassy.org/trade/wltr%202004.pdf; NEB, *Canadian Energy Overview 2006*, at 3 (May 2007), *available at* http://www.neb.gc.ca/energy/EnergyReports/cndnnrgyvrvw2006_e.pdf; Natural Resources Canada, *Statistics and Facts on Energy*, *at* http://www.nrcan.gc.ca/statistics/energy/default.html (viewed July 10, 2007).

[6] For example, "in 2005, the U.S. imported 44.5 million megawatt hours from Canada and exported 19.8 million megawatt hours to Canada." *Integrated Market* at 7.

[7] *See* NEB, *Electricity Exports and Imports*, *at* https://www.neb-one.gc.ca/Statistics/ElectricityExportsImports/index_e.htm (viewed July 10, 2007) (reporting data for 1997 to present).

[8] *See Canada: Energy Provision*, EIU ViewsWire (Aug. 18, 2004).

billion cubic feet of natural gas to the United States, worth more than $200 billion Canadian.[9]

The energy trade between the United States and Canada provides numerous benefits to each nation. It "allows for efficient use of resources particularly where seasonal peak demands are complementary." *Id.* at 7. During the summer, Americans buy Canadian electricity to run their air conditioners; in the winter, Canadians purchase American electricity to power their heaters. Cross-border trade also provides an additional source of power "during times of emergency outages or periods of high electricity demand." *Id.* In addition, the energy trade "allows for the sale of inexpensive surplus power" and "enhances the reliability of each country's transmission system." *Id.* As competitive electricity markets mature, "the importance of cross-border trade will only increase." *Id.* at 5.

The steady flow of energy between the United States and Canada is made possible by the extensive transmission system connecting the two nations' electricity markets. That system is "among the most integrated and reliable in the world and combines a diversity of fuel sources, extensive transmission interconnects and two-way trading that benefits both countries." *Id.* at 1.[10]

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[9] *See* NEB, *Natural Gas Exports*, *at* https://www.neb-one.gc.ca/Statistics/NaturalGasExports/gas07.xls & https://www.neb-one.gc.ca/Statistics/NaturalGasExports/gas01.xls; *see also* Alastair R. Lucas, *Canada's Role in the United States' Oil and Gas Supply Security: Oil Sands, Arctic Gas, NAFTA, and Canadian Kyoto Protocol Impacts*, 25 Energy L.J. 403, 408 (2004) ("Approximately 3.8 [trillion cubic feet] annually, or 63% of total Canadian production [of natural gas], is exported to the United States. 'Canada accounts for about 94 percent of United States imports' and has a 15% share of the United States market.") (footnote omitted).

[10] *See* Joseph M. Dukert, Institute for Research on Public Policy, *The Quiet Reality of North American Energy Interdependence* 1 (2004) ("North America has spawned the largest integrated energy market the world has ever seen. Trilateral cooperation among its three sovereign nations is especially evident in respect to natural gas and electricity, whose availability and price are continually affected by the transborder pipelines and power lines that have multiplied in the past dec-

Each country's competitive wholesale markets depend on interconnection with the other country. *See id.* at 5. And "[i]ncreased integration of the U.S./Canadian marketplace will help to reduce the current uncertainty regarding energy supply in North American energy markets, thereby providing increased energy security." *Id.* at 8.

The United States Department of Energy ("DOE") has recognized Canada as this country's "most important energy partner in the world" and a "strategic ally" with which the United States has "a strong, stable relationship."[11] In particular, the DOE has acknowledged Canada's role as "the United States' major partner" in "international electricity trade."[12] Those statements give voice to what is unmistakable from the evidence: the United States depends heavily on Canadian energy imports.

II. THE NINTH CIRCUIT'S DECISIONS IN THESE CASES DISCOURAGE CANADIAN ELECTRICITY EXPORTS TO THE UNITED STATES

Petitioners convincingly demonstrate that the Ninth Circuit's decisions introduce a significant level of uncertainty into United States electricity markets that will discourage United States investors from contributing capital to construct generation facilities to meet growing United

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ade."), *available at* http://www.irpp.org/wp/archive/NA_integ/wp2004-09h.pdf; *Integrated Market* at 7-8 ("The electric transmission systems in Canada and the U.S. are interconnected at key points along the Canada/U.S. border. Natural gas and oil pipelines also do not stop at the border, but instead provide a vast network for the movement of natural gas in the North American market.").

[11] Prepared Statement of Karen A. Harbert, Assistant Secretary for Policy and International Affairs, U.S. Department of Energy, Before the House Committee on Government Reform, Subcommittee on Energy and Resources, and Subcommittee on National Security, Emerging Threats, and International Relations, "Energy as a Weapon: Implications for US Policy" at 4 (May 16, 2006), *available at* http://www.pi.energy.gov/documents/HarbertTestimony51606FINAL.pdf.

[12] U.S. Dep't of Energy, Office of Coal, Nuclear, Electric and Alternate Fuels, Energy Info. Admin., *Electric Power Annual 2005*, at 6 (Nov. 2006), *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epa.pdf.

States demand for energy. Those same disincentives also apply to Canadian decision-makers, which will similarly be wary of developing resources to serve an unreliable United States market.

A. The Decisions Below Create Strong Disincentives For The Exercise Of Political Will To Support Power Exports To The United States

Canada is blessed with extensive electric generating resources, many of which produce hydroelectricity. Several provinces, including Quebec, Ontario, Newfoundland, Manitoba, and British Columbia, have several thousand megawatts of undeveloped hydroelectricity. Because hydroelectric generation involves the long-term commitment of substantial public and natural resources, decisions regarding whether to generate excess electricity for export and where to export that electricity entail public debate, often in a politically charged atmosphere.

Hydro Quebec, British Columbia Hydro and Power Authority ("BC Hydro"), and Manitoba Hydro are the three leading generators of Canadian electricity that is exported to the United States, together generating nearly 70 percent of the electricity that is exported to the United States.[13] Consequently, the robust trade in electricity between Canada and the United States depends on the ability of those companies and others like them to justify expending the funds used to generate electricity that will ultimately be exported to the United States. However, the Ninth Circuit's decisions introduce a significant level of uncertainty into United States electricity markets, providing further ammunition for opponents of energy exports to the United States and contributing to a political

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[13] *See* NEB, *Electricity Exports and Imports, Monthly Statistics for December 2006*, Tables 2A, 3A (Apr. 26, 2007), *available at* http://www.neb.gc.ca/clf-nsi/rnrgynfmtn/sttstc/lctrctyxprtsndmprtssttstc/2006/elx0612_e.pdf; NEB, *Electricity Exports and Imports, Monthly Statistics for December 2005*, Tables 2A, 3A (Nov. 30, 2006), *available at* http://www.neb.gc.ca/clf-nsi/rnrgynfmtn/sttstc/lctrctyxprtsndmprtssttstc/2005/elx0512_e.pdf. This figure includes exports by Powerex Corp., a wholly owned subsidiary of BC Hydro.

climate that may render the required generation activities infeasible for Canadian exporters of hydroelectricity.

The construction of major hydroelectric systems can have significant consequences for the local environment, indigenous groups, and socio-economic conditions. A substantial body of public opinion has debated whether it is appropriate to incur those costs merely to facilitate sales to another country.[14] And, aside from the question whether to build additional generation for export, the public also has questioned the wisdom of committing volumes of electricity produced by existing facilities to export. Critics claim that such exports will require the development of expensive new generation facilities; adversely affect the Canadian environment and indigenous peoples; and, most recently, impede Canada's efforts to meet its Kyoto and other international environmental obligations.[15] In light of such criticisms, Canadians must be persuaded that significant, dependable benefits will offset the substantial costs – both private and public – that may

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[14] *See* NEB, *Reasons for Decision In re Hydro-Québec for Exports to the Vermont Joint Owners and New York Power Authority*, EH-3-89, at 17 (Aug. 1990); Pamela Prodan, *The Legal Framework for Hydro-Quebec Imports*, 28 Tulsa L.J. 435, 436 (1993); Rosemary C. Blinn, Comment, *The Canadian Administrative Process for Evaluating the Transboundary Environmental Impact of Energy Exports*, 7 Conn. J. Int'l L. 337, 338-39 (1992); Alexander J. Black, *Environmental Impact Assessment and Energy Exports*, 16 Loy. L.A. Int'l & Comp. L.J. 799, 848-49 (1994); Ralph W. Johnson, *The Canada-United States Controversy over the Columbia River*, 41 Wash. L. Rev. 676, 744 (1966); Shelly P. Battram & Reinier H. Lock, *The Canada/United States Free-Trade Agreement and Trade in Energy*, 9 Energy L.J. 327, 334-36 (1988).

[15] *See* Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (Apr. 2, 1997), *available at* http://www.cec.org/files/pdf/sem/ACF756.pdf; Robert Page, *Kyoto and Emissions Trading: Challenges for the NAFTA Family*, 28 Can.-U.S. L.J. 55, 63-64 (2002); Nigel Bankes, *Environment: Garrison Dam, Columbia River, the IJC, NGOs*, 30 Can.-U.S. L.J. 117, 118, 126-27 (2004); *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Athabasca Chipewyan First Nation v. British Columbia Hydro & Power Auth.*, [2001] 3 F.C. 412, ¶¶ 4-7.

be incurred to create and to operate hydroelectric generating facilities.

Several significant hydroelectric generation projects are under active consideration throughout Canada, and the stability of the United States export market will be an important factor in deliberations on those projects, in particular the debate over if and when the projects are needed. For example, in British Columbia, the official Energy Plan of the Province identifies the potential for development at "Site C" on the Peace River. BC Hydro previously sought approval of that project in the early 1980s, but a great deal of political controversy arose and the Provincial Cabinet denied approval because there was no demonstrated need in British Columbia for the additional generation capacity. *See* British Columbia Utilities Commission, *Site C Report & Recommendations to the Lieutenant Governor-in-Council*, at 10-11, 269-83 (May 1983); *see also* Johnson, 41 Wash. L. Rev. at 744. Today, the Province's Energy Plan makes clear that "Site "C" will be developed only if the Provincial Cabinet approves,[16] after first consulting with the Province of Alberta and representatives of indigenous peoples. Thus, the decision today is likely to be the subject of even more political discussion and debate than it was in the 1980s.[17]

In Manitoba, Manitoba Hydro is currently building the Wuskwatim generation facility to meet the future needs of Manitoba citizens.[18] It will complete construction of that

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[16] *See* British Columbia Ministry of Energy and Mines, *Energy for Our Future: A Plan for BC* at 30 (Nov. 2002), *available at* http://www.gov.bc.ca/empr/down/solutions_sept_27.pdf; British Columbia Ministry of Energy, Mines and Petroleum Resources, *The BC Energy Plan: A Vision for Clean Energy Leadership* at 23 (Feb. 2007), *available at* http://www.energyplan.gov.bc.ca/PDF/BC_Energy_Plan.pdf.

[17] *See, e.g.*, Official Report of Debates of the Legislative Assembly, 38th Parliament, 2d Sess. (*Hansard*), Vol. 9, No. 7, at 3931, 3935-36 (Apr. 24, 2006), *available at* http://www.leg.bc.ca/hansard/38th2nd/H60424p.htm.

[18] *See* http://www.gov.mb.ca/est/energy/power/generating.html; http://www.hydro.mb.ca/projects/wuskwatim/overview.shtml.

facility ahead of domestic need, which will produce surplus energy until demand in Manitoba increases to consume the new supply. The development of the Wuskwatim project has faced criticism in Manitoba on several fronts, including questions about whether Manitoba needs the facility at all.[19] Along with Wuskwatim, there are several other potential hydroelectric developments within Manitoba totaling several thousand megawatts, and doubts concerning the reliability of the United States export markets could make other Canadian provinces more appealing for trade than the United States.

Similarly, Newfoundland currently is considering the development of an additional 2,800 megawatts of power below Churchill Falls in Labrador, with construction potentially commencing in 2009.[20] The province has expressed an interest in marketing the power directly to United States markets either by acquiring transmission rights through Quebec or via an undersea cable.[21] The most significant generating project undertaken previously in that region was built in reliance on a 65-year contract between Hydro Quebec and Churchill Falls (Labrador) Corporation for the sale of power generated at Churchill Falls.[22] Newfoundland passed legislation voiding the con-

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[19] *See, e.g.*, Manitoba Clean Environment Commission, *Report to the Minister of Conservation on Public Meetings: Draft Environmental Impact Statement Guidelines for the Wuskwatim Generation and Transmission Projects* at 5-12 (Apr. 2002), *available at* http://www.hydro.mb.ca/projects/wuskwatim/cec_report.pdf.

[20] *See* http://www.lowerchurchillproject.ca/LCWeb/LowerChurchill.nsf/GeneralDocs/A6496EB6D3B13269A32571FD0066CC71?OpenDocument&menucat=About&submenucat=&linkname=Lower%20Churchill%20Project.

[21] *See* http://www.lowerchurchillproject.ca/LCWeb/NewsArchive.nsf/NewsArchive/6F15339CAD798B77A32571FD0064C82B?Opendocument.

[22] *See* Jason L. Churchill, *Power Politics and Questions of Political Will: A History of Hydroelectric Development in Labrador's Churchill River Basin, 1949-2002*, at 7 (Mar. 2003), *available at* http://www.gov.nf.ca/publicat/royalcomm/research/Churchill.pdf.

tract because, in hindsight, it determined that the contract was overly detrimental to the seller.[23] That legislation, however, was struck down as *ultra vires* by the Supreme Court of Canada. *See Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297. In light of that history, it seems unlikely that Newfoundland, having been thwarted in its efforts to indulge seller's remorse in connection with the original project, would now dedicate the output from any new development to a market that would indulge buyer's remorse.

The Ninth Circuit's decisions in these cases may cause citizens and political leaders to fear that the expected benefits of sales of power from potential new generation projects in Canada will not materialize. Given the volatile nature of wholesale electricity prices, there is always a potential for buyer's remorse associated with long-term contracts. And the Ninth Circuit's revisions to the *Mobile-Sierra* doctrine invite all of those remorseful buyers to challenge their contracts before FERC.[24] The Ninth Circuit's decisions thus undermine confidence in the sanctity of contracts – confidence that Canadian exporters of hydroelectricity require to develop incremental hydroelectric generating capacity necessary to meet future United States energy needs. Confidence in the sanctity of long-term contracts is particularly important for hydroelectric investment decisions because hydroelectric generation has very high initial capital costs, but low operating costs and a long asset life.[25]

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[23] *See* Upper Churchill Water Rights Reversion Act, S. Nfld. 1980, ch. 40.

[24] Moreover, the additional risk for Canadian sellers to United States markets introduced by *Snohomish County* is not confined to owners of major hydroelectric facilities. Owners of conventional thermal generation facilities in Canada will also face risks on sales into United States markets not present in connection with sales into comparable Canadian markets.

[25] Some hydroelectric facilities have been in service for more than 100 years. For example, the Decew Falls I hydro plant, part of the Niagara Falls complex and now owned by Ontario Power Generation, has

B. The Decisions Below Create Asymmetrical Risk That May Discourage Power Exports To The United States

In addition to the adverse political consequences that the Ninth Circuit's decisions in these cases will have for Canadian hydroelectricity exporters, the decisions more generally will discourage *all* Canadian power sellers from exporting surplus energy to the United States. That is because a Canadian utility's sales to the United States will face greater regulatory uncertainty than equivalent sales in Canada. Unlike the aggressive regulatory role that the Ninth Circuit envisions for FERC, Canadian regulators rarely seek to invalidate competitive wholesale power contracts negotiated at arms-length between sophisticated market participants.[26]

In addition, by distinguishing between the need and extent of regulatory interference with the sanctity of contract in cases where rates are seen to be "too low" as opposed to "too high,"[27] the decisions below signal to Canadian sellers that regulatory intervention by FERC is much more likely to be to their detriment than in their favor. That is, by making the consumer interest preeminent, the Ninth Circuit has introduced an asymmetry to the risks associated with bilateral contracts that does not exist in Canada (and had not previously existed in the United States). In Canada, the law is settled that the role of energy regulators is "to protect both the customer *and*

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been in service since August 25, 1898, and is listed by the Institute of Electrical and Electronics Engineers Milestones as a key historical achievement in electrical and electronic engineering.

[26] *See, e.g., Chandler v. Alberta Ass'n of Architects*, [1989] 2 S.C.R. 848; BCUC, *Reasons for Decision In re British Columbia Hydro and Power Authority Call for Tenders for Capacity on Vancouver Island and Review of Electricity Purchase Agreement*, E-1-05, at 13 (Mar. 9, 2005), *available at* http://209.17.158.138:8080/library01/002/101/BCHDec2005 0309.pdf?.

[27] *See* Pet. App. 63a (holding that it is easier to modify contracts with prices that are "too high" than to modify contracts with prices that are "too low").

the investor," and not to prefer one over the other. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utils. Bd.)*, [2006] 1 S.C.R. 140, ¶ 64.

In sum, the decisions below force Canadian exporters to assume two significant, additional risks if they wish to sell to United States purchasers. First, they must accept that dissatisfied buyers can provoke after-the-fact regulatory interference with bilateral negotiated agreements. Second, they can anticipate that, when regulatory interference does occur, it will be undertaken with preference for the short-term interests of the buyer over the long-term interests of the entire economy. Those risks can be expected to dampen Canadians' enthusiasm for increasing generation capacity for export and, once having built that capacity, to reduce their desire to sell energy into United States markets.

C. The Decisions Below May Cause Canadian Regulators To Prohibit Energy Producers From Exporting To The United States

These cases are not the first time that United States regulators have taken action that threatens the stability of bilateral contracts with Canadian suppliers in response to buyer's remorse of United States purchasers. In 1988, a Canadian power seller, Alberta & Southern ("A&S"), applied to the NEB for an extension of its gas-export license to allow it to export natural gas for use by a United States entity, Pacific Gas & Electric ("PG&E"). *See* J. Owen Saunders, *GATT, NAFTA and North American Energy Trade: A Canadian Perspective*, 12 J. Energy Nat. Resources L. 4, 19 (1994). The NEB was reluctant to issue the extension because of concerns about "the reliability of the California market." *Id.* But the California Public Utilities Commission ("CPUC") promised that California's natural gas market was "reliab[le]" and "stab[le]." *Id.* Influenced by those assurances, the NEB granted the necessary extension. *Id.* at 19-21.

Subsequently, prices in short-term natural-gas markets fell significantly, becoming much lower than the prices

agreed to under the long-term contract between A&S and PG&E. Behaving much like it has in recent years, the CPUC "demanded that the long-term contracts entered into by PG&E be re-negotiated to provide California consumers with greater flexibility." *Id.* at 20. The Canadian Petroleum Association complained to the NEB. The NEB strongly objected to the CPUC's actions, opining that they "fundamentally change[d] the basis upon which [the NEB] was persuaded to issue" A&S the license extension. NEB, *Reasons for Decision In re Canadian Petroleum Association Ltd.*, GH-R-1-91, at 28 (June 1992), *available at* http://dsp-psd.pwgsc.gc.ca/Collection/NE22-1-1992-10E.pdf. In those circumstances, the NEB determined that it could not "stand idly by when the regulatory actions of others adversely affect the basis upon which it was persuaded to issue a license." *Id.* at 46. While the NEB acknowledged that its policy was to encourage a free market, nationally and internationally, it warned that its "commitment to a freely-functioning gas market does not imply or entail that it automatically take regulatory actions parallel to and supportive of regulatory actions in other jurisdictions, if such actions would have the effect of overturning, at short notice and without an adequate transitional period, negotiated contractual arrangements on which this Board placed reliance in its decisions." *Id.* The NEB's statements raised the prospect that it might deny future export permits rather than allow Canadian power to be sold into a regulatory environment that does not respect contractual certainty.

The Ninth Circuit's decisions in these cases again raise the unfortunate specter of a regulatory contest between Canadian and United States regulators in which the first casualty will be the economic benefits that free markets can bring to generators and consumers alike.

III. THE NINTH CIRCUIT'S DECISIONS UNDERMINE THE UNITED STATES' TREATY OBLIGATIONS

A. By Encouraging FERC To Interfere With Energy Contracts, The Decisions Below Threaten The United States' Ability To Comply With NAFTA Article 606

NAFTA requires member countries' regulators to respect the sanctity of energy contracts. Article 606(2) provides, in pertinent part, that "[e]ach Party shall seek to ensure that in the application of any energy regulatory measure, energy regulatory bodies within its territory avoid disruption of contractual relationships to the maximum extent practicable." 32 I.L.M. 289, 365 (1992). FERC is an "energy regulatory bod[y]" under Article 606(2) and therefore must "avoid disruption of contractual relationships to the maximum extent practicable." *Id.*

Article 606 comports with the United States' and Canada's longstanding recognition of the importance of contractual certainty to maintaining a sufficient supply of energy. Before NAFTA, "United States trade policy strongly support[ed] contract sanctity as an important factor in international commercial transactions." *New Gas Importation Policy Guidelines*,[28] 49 Fed. Reg. at 6684. The DOE explained that "[g]overnmental action that, in effect, unilaterally renegotiates gas import contracts to the short-term advantage of the U.S. could jeopardize gas import supplies when the demand for imported gas increases in the future." *Id.* Canada's policies were "very much in line" with the United States' policies (at least as they existed before the Ninth Circuit's decisions in these cases). Saunders, 12 J. Energy Nat. Resources L. at 18.

The United States has not uniformly respected the sanctity of energy contracts, however. In fact, NAFTA

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[28] New Policy Guidelines and Delegation Orders from Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6684 (1984) ("*New Gas Importation Policy*").

Article 606 was drafted in response to the contractual dispute between A&S and PG&E discussed above – a dispute much like the ones underlying these cases. Although A&S and PG&E ultimately reached a compromise in that case, *see id.* at 20, Canada sought to obtain protection against a recurrence of such issues by insisting on the promulgation of NAFTA Article 606, *see id.* at 22.

The drafters of NAFTA recognized that "[o]ne of the most difficult problems in attempting to create competitive markets in a regulated industry in which long-term contracts may be central is the potential for regulatory interference (sometimes viewed as a necessity on public policy grounds) with those contracts when their pricing provisions get out of sync with market conditions." Reinier Lock, *Mexico-United States Energy Relations and NAFTA*, 1 U.S.-Mex. L.J. 235, 248 (1993). Article 606 was intended to prevent the "endemic problem where economic regulators are given a great deal of latitude to act in the 'public interest' with regard to the commercial sector, as they typically are in the United States." *Id.*

By disregarding the sanctity of contracts firmly rooted in United States and Canadian law and policy (and reflected in this Court's *Mobile-Sierra* doctrine), the decisions below threaten to place the United States out of step with its Article 606 obligations. The Ninth Circuit imposed two related duties on FERC that have that undesirable effect: (1) FERC must "implement[] and use[] an effective oversight mechanism" that "ensure[s] that [contract] rates [are] within the statutory 'just and reasonable' range," Pet. App. 48a, 51a; and (2) when a purchaser challenges a contract rate as being unjust and unreasonable, FERC must "revisit[] the market circumstances in which the agreements were entered to determine whether those circumstances were sufficiently functional that they were likely to yield long-term contracts within the 'just and reasonable' range," *id.* at 54a. By requiring FERC to micromanage rates set by contract and to "revisit[]" them after the fact, the Ninth Circuit is requiring FERC to "disrupt[] . . . contractual relationships," which NAFTA Article 606

prohibits. Furthermore, the Ninth Circuit departed from the *Mobile-Sierra* doctrine, which in the past greatly reduced the opportunities for conflicts with Article 606 because courts closely policed FERC's authority to alter long-term contracts under a public-interest standard akin to the one followed in Canada. The Ninth Circuit's decisions consequently pose substantial threats to the United States' ability to comply with Article 606.

B. The Decisions Below Undermine The Purposes Of Treaty Provisions Designed To Ensure Reliable Energy Trade

The Ninth Circuit's decisions in these cases also undermine the purposes of multiple treaty provisions designed to promote the reliability of the transnational energy trade between the United States and Canada. Those provisions are Articles 605 and 607 of NAFTA, as well as Articles 904 and 907 of the FTA, which preceded NAFTA. All of those provisions are designed to limit the ability of the United States and Canada to "adopt or maintain a restriction" on the export of energy, thereby ensuring a steady flow of energy between the nations.[29]

The United States sought those provisions to ensure a reliable supply of energy from the north. *See* Saunders, 12 J. Energy Nat. Resources L. at 8.[30] Canada had a com-

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[29] NAFTA Article 605 allows a "Party" to "adopt or maintain a restriction" on "the export of an energy or basic petrochemical good to the territory of another Party" only in certain limited circumstances. 32 I.L.M. at 365. It "reproduces almost exactly[] provisions of the [FTA]" and "amounts to a North American energy resource supply guarantee." Lucas, 25 Energy L.J. at 421-22; *see* Lock, 1 U.S.-Mex. L.J. at 245 (same); FTA art. 904, 27 I.L.M. 281, 344 (1988). NAFTA Article 607, 32 I.L.M. at 365, which similarly reproduces its FTA counterpart, *see* FTA art. 907, 27 I.L.M. at 344, "limits use of the national security exemption found elsewhere in [NAFTA], to justify restrictions on energy imports and exports." Lucas, 25 Energy L.J. at 421-22; *see* Lock, 1 U.S.-Mex. L.J. at 245 (same).

[30] *See also New Gas Importation Policy*, 49 Fed. Reg. at 6688 ("The security of gas supply and its transportation to the U.S. border remain important components of the public interest, especially those under

plementary interest in protecting "an unimpeded source of energy demand" from the south. *See id.*[31] The NAFTA and FTA energy provisions "reflect[] an accommodation of both those interests." *Id.* They serve the purpose of "eliminating any fear that a producing country could reduce exports on which the consuming country was dependent in a discriminatory manner or for political purpose."[32] And the treaties have had the salutary "effect of overcoming much of the [United States'] concern over the security of the supply" from Canada. Conine, 27 Tex. Int'l L.J. at 681.

The decisions below undermine the energy provisions of NAFTA and the FTA by reducing the reliability of energy supply. By extending to energy buyers an open invitation to challenge energy contracts, the Ninth Circuit's decisions discourage Canadian sellers from entering into forward contracts subject to FERC's regulation. FERC's regulatory interference with forward contracts will impede energy trade by upsetting parties' settled contractual expectations, which is exactly what the energy provisions of the FTA and NAFTA sought to prevent.[33]

CONCLUSION

The petitions for a writ of certiorari should be granted.

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long-term arrangements. An import will be considered secure if it does not lead to undue dependence on unreliable sources of supply.").

[31] *See also* Battram & Lock, 9 Energy L.J. at 336 ("Canadian concerns relate primarily to fears that U.S. economic protectionism . . . will interfere with long-term market stability.").

[32] Gary B. Conine, *Natural Gas Transactions Between the United States and Mexico: Political and Legal Impediments to Free Trade*, 27 Tex. Int'l L.J. 577, 681 (1992).

[33] *Cf.* Conine, 27 Tex. Int'l L.J. at 685 ("As long as either trading partner must make case-by-case determinations on gas transactions under policies that second-guess results dictated by market mechanisms, trade will be impeded.").

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